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EX PARTE

October 7, 2008

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

RE: *In the Matters of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *IP-Enabled Services*, WC Docket No. 04-36; *Universal Service Contribution Methodology*, WC Docket No. 06-122; *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, WC Docket No. 05-195

Dear Ms. Dortch:

Qwest Communications International Inc. hereby submits in the above-referenced dockets the enclosed White Paper, which is entitled "Legal Authority for Comprehensive Intercarrier Compensation Reform."

This *ex parte* is being filed pursuant to Sections 1.49(f) and 1.1206 of the FCC's rules, via the Electronic Comment Filing System.

Please do not hesitate to contact the undersigned to discuss this matter further.

Sincerely,

/s/ Melissa E. Newman

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of	)	
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Developing a Unified Intercarrier Compensation Regime;	)	CC Docket No. 01-92
	)	
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	)	
Universal Service Contribution Methodology;	)	WC Docket No. 06-122
	)	
Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight	)	WC Docket No. 05-195

LEGAL AUTHORITY FOR COMPREHENSIVE INTERCARRIER COMPENSATION REFORM

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October 7, 2008

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I. INTRODUCTION AND SUMMARY.

In a previous letter filed on September 24, 2008 ("*Comprehensive Reform Letter*"), Qwest Communications International Inc. ("Qwest") set forth its views on how the Federal Communications Commission ("Commission" or "FCC") should reform the intercarrier compensation regime.[1] As specified in Qwest's *Comprehensive Reform Letter*, Qwest urges the Commission to adopt a "bill and keep at the edge" approach to termination charges for all traffic [hereafter "bill and keep"].[2] Alternatively, should the Commission pursue a unified $0.0007 per-minute terminating rate plan such as that recently proposed by Verizon, Qwest urges the Commission to do so only if it also makes a number of important clarifications.[3] And, regardless of whether the Commission adopts bill and keep or a unified $0.0007 terminating rate plan, the Commission must also, as Qwest also explained in that prior filing, establish an access revenue recovery mechanism ("ARRM") to ensure that carriers are not precluded from recouping their costs. In this letter, Qwest explains that the Commission has legal authority to implement these proposals.

As is detailed below, the Commission enjoys legal authority under two alternative theories to implement either a bill and keep regime or a unified $0.0007 rate plan for the termination of all telecommunications traffic. Specifically, the Commission could effectuate,

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[1] *See* Letter from Melissa E. Newman, Vice President, Qwest Communications International Inc. to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, *et al.* (filed Sept. 24, 2008).

[2] Qwest's bill and keep proposal, like the unified $0.0007 per-minute terminating rate plan supported by Verizon and others, would replace only terminating intercarrier compensation charges (*i.e.*, reciprocal compensation for local traffic and interstate and intrastate terminating access charges). Originating access should remain unchanged and the Commission would address the future status of originating access in a Further Notice of Proposed Rulemaking. Additionally, as with the Verizon $0.0007 per-minute terminating rate plan, by "all traffic," Qwest, in this document, means all traffic without regard to whether it is local, long distance, wireless, Voice over Internet Protocol ("VoIP"), etc.

[3] *Comprehensive Reform Letter* at 3, 10-11.

under sections 251(b)(5) and 252(d)(2) of the Communications Act of 1934, as amended (the "Act"), either a bill and keep or a unified $0.0007 rate methodology to govern compensation for termination of that traffic. Alternatively, if the Commission were to conclude that intrastate access does not fall within the scope of section 251(b)(5), it may still impose either a bill and keep regime or a $0.0007 rate plan for intrastate access utilizing its section 201 authority and relying on preemption of inconsistent state action.

Finally, as is also detailed below, the Commission, whether it adopts a bill and keep regime or a $0.0007 rate plan, has legal authority to adopt Qwest's proposed ARRM and, in fact, has a legal obligation to ensure that carriers have a reasonable opportunity to recover their costs under either of these new regimes.

II. DISCUSSION.

A. The Commission Has Legal Authority to Adopt Bill and Keep for All Calls.

The Commission enjoys legal authority to implement a bill and keep regime for the termination of all telecommunications traffic under either of two theories, both of which have been set forth in detail in previous pleadings. Qwest summarizes these rationales below.

1. The Commission May Effectuate A Bill And Keep Solution Under Sections 251(b)(5) And 252(d)(2) Of The Act.

The Commission is free to determine that section 251(b)(5) of the Act applies to all telecommunications traffic, and to prescribe a bill and keep methodology to govern compensation for termination of that traffic.

Section 251(b)(5) directs local exchange carriers ("LECs") "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The associated pricing provision, section 252(d)(2)(A)(i)-(ii), asserts that rates for reciprocal compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and must reflect "a reasonable approximation of the additional costs of terminating such calls." Based on this language, the Commission in 1996 "conclude[d] that section 251(b)(5) reciprocal compensation should apply only to traffic that originates and terminates within a local area," and was "intended for a situation in which two carriers collaborate to complete a local call."[4]

However, the Commission is at liberty to revisit its prior determination and to hold that sections 251(b)(5) and 252(d)(2) in fact apply to *all* traffic involving a LEC or commercial mobile radio service ("CMRS") provider. Nothing in the term "transport and termination" on its face limits section 251(b)(5) to local traffic, as *all* calls will "terminate" somewhere. Nor does section 252(d)(2)'s reference to "mutual and reciprocal recovery" necessarily limit that provision's scope to traffic involving only two carriers: It is perfectly plausible for Congress to have assumed that carriers negotiating interconnection agreements would address (and that states would in some cases arbitrate) rates that applied to traffic flowing in both directions, whether or not a third carrier was also involved. Thus, these arrangements would account for the "mutual and reciprocal recovery" of costs by originating and terminating carriers even when an intermediate carrier played a role in completing any given call (*e.g.*, for long distance traffic scenarios).

Moreover, other section 251 language suggests that the Commission retains leeway to bring non-local traffic and, specifically, intrastate access traffic within the ambit of section

[4] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16013 ¶ 1034 (1996) (subsequent case history omitted) ("*Local Competition Order*").

251(b)(5).[5] Specifically, section 251(g) states that, following the Act's effective date, every LEC "shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers" on the same terms that had applied previously, "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission." As the D.C. Circuit has explained, this provision was meant to permit an orderly transition to post-Act compensation agreements.[6] But if Congress did not contemplate that the Commission might interpret section 251(b)(5) to encompass non-local "access" traffic, there would have been no reason for Congress to set forth such a transition. Thus, section 251(g) indicates that Congress at the least recognized that the Commission might apply section 251(b)(5) to non-local, intrastate access traffic. Nor is it at all surprising that section 251(b)(5), a product of the Telecommunications Act of 1996 (the "1996 Act"), can be read to supersede state authority with respect to otherwise "intrastate" traffic: As the Supreme Court recognized in 1999's *AT&T v. Iowa Utilities Board*, the 1996 Act brought numerous matters formerly subject to exclusive state jurisdiction under federal control.[7]

If the Commission were to deem all traffic terminating with a LEC subject to section 251(b)(5), it would then have authority to prescribe the bill and keep methodology for setting those rates. Section 201(b) of the Act affords the Commission authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the

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[5] Qwest focuses here on intrastate access charges because it is beyond debate that the Commission is authorized to address interstate access and reciprocal compensation for local traffic in a new bill and keep intercarrier compensation regime for the termination of traffic. Sections 201 and 251(b)(5) plainly provide such authority.

[6] *See WorldCom, Inc. v. FCC*, 288 F.3d 429, 430-33 (D.C. Cir. 2002) (subsequent case history omitted).

[7] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999) (subsequent case history omitted).

Communications Act]."[8] In *Iowa Utilities Board*, the Supreme Court emphasized that this provision "*explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."[9] The Court specifically rejected arguments that states enjoyed unfettered discretion in setting rates for services that LECs must provide pursuant to interconnection agreements under sections 251 and 252, and affirmed the Commission's authority to establish "a . . . requisite pricing methodology."[10] This is exactly what Qwest and others have proposed here.

Additionally, it is noteworthy that the *Iowa Utilities Board* decision addressed the roles of the FCC and the states in the context of pricing standards for interconnection and resale under sections 251(c)(2) and (c)(4), respectively – *i.e.*, not transport and termination under section 251(b)(5). The express language of section 252(d)(2), addressing pricing standards for transport and termination of traffic under section 251(b)(5), is materially different from the language of sections 252(d)(1) and (d)(3), addressing pricing standards for interconnection/network and resale services under sections 251(c)(2) and (c)(4), respectively. Whereas the language of sections 252(d)(1) and (d)(3) directs states to "determine" rates based on specified pricing standards, the language of section 251(d)(2) is stated in the negative and simply provides that states shall not consider rates unreasonable unless certain pricing standards have been met. This language therefore suggests that Congress intended that state discretion was to be even more circumscribed in the section 252(d)(2) context than in the context of sections 252(d)(1) and (d)(3).

Finally, section 252(d)(2) clearly permits a bill and keep methodology. Although section 252(d)(2)(A)(ii) states that transport and termination rates shall be based on a "reasonable

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[8] 47 U.S.C. § 201(b).

[9] *Iowa Utils. Bd.*, 525 U.S. at 380 (emphasis in original).

[10] *Id.* at 384.

approximation of the additional costs of terminating … calls," section 252(d)(2)(B)(i) expressly permits "arrangements that waive mutual recovery (such as bill-and-keep arrangements)." And, the instant record contains voluminous evidence supporting a bill and keep approach for the termination of traffic involving a LEC.[11] Thus, the Commission has legal authority to establish bill and keep as the "requisite pricing methodology" for section 251(b)(5) traffic.[12]

For these reasons, sections 251(b)(5) and 252(d)(2) provide a jurisdictional basis for the Commission to establish a bill and keep approach to termination charges for all traffic.

2. The Commission May Effectuate A Bill And Keep Solution For Intrastate Access Under Section 201 Of The Act.

Alternatively, if the Commission were to conclude that intrastate access does not fall within the scope of section 251(b)(5), it may still impose a bill and keep regime utilizing its section 201 authority.[13] This legal rationale was described most recently by Verizon

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[11] *See generally Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, Appx. C (2005), and sources cited therein (evaluating existing record). This record, for example, clearly supports a conclusion that, based on certain assumptions also fairly reflected in the record (*e.g.*, that carriers should look first to their end users for recovery of their costs), there is no additional termination cost to recover when carriers terminate either local or long distance traffic.

[12] While the bill and keep methodology admittedly provides state commissions with very little discretion over the pricing mechanism, states arbitrating compensation arrangements under a given agreement would retain broad discretion over applicable non-price terms of interconnection. However, the pricing mechanism would have to include a definition of the edge or point of interconnection ("POI"). As Qwest specified in its *Comprehensive Reform Letter*, definition of the POI is an essential characteristic that must be spelled out in an order adopting bill and keep in order to ensure that the costs incurred by terminating carriers are true termination charges. As Qwest also specified in that letter, the Commission should, in adopting Qwest's bill and keep proposal, simply adopt the definition of the POI contained in Verizon's recent proposal. *Comprehensive Reform Letter at* 9.

[13] Under this rationale, the Commission would still rely on sections 251(b)(5) and 252(d)(2) to establish bill and keep for local traffic, but would rely on section 201 and its preemption authority to establish bill and keep for interstate traffic and to preclude positive rates (*i.e.*, anything other than bill and keep) for termination of intrastate access traffic.

Communications[14] as supporting Commission authority to establish a \$0.0007 rate plan. But the same rationale would also support Commission authority to establish a bill and keep plan. Under this approach, the Commission would preempt state regulation over compensation for intrastate access calls to the extent that this regulation imposed positive rates (*i.e.*, to the extent it did not reflect a bill and keep methodology). Applying well-settled precedent and the customary principles of federal preemption, the increasing difficulty of assessing the jurisdiction of a particular call in an age of wireless and IP-based calls would justify such preemption.[15]

There is no dispute over the Commission's section 201 authority to establish rates governing interstate access charges. Section 201 authorizes the Commission to set "just and reasonable" rates for interstate telecommunications. Moreover, section 251(i) specifies that "[n]othing in [section 251] shall be construed to limit or otherwise affect the Commission's authority under section 201." Section 251's legislative history confirms that subsection (i) was meant to "make[] clear the conferees' intent that the provisions of new section 251 are in addition to, and in no way limit or affect, the Commission's existing authority regarding interconnection under section 201 of the Communications Act."[16]

With respect to intrastate access traffic, the Commission could preempt state authority to establish positive compensation rates. As Verizon has explained at length,[17] the traditional assumptions linking a calling or called party's phone number to his or her physical location no longer apply to many calls. In particular, growth in use of VoIP, mobile wireless telephony, and

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[14] Letter (and attachment thereto) from Donna Epps, Vice President, Verizon, to Marlene H. Dortch, Secretary, FCC, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *et al.* (filed Sept. 19, 2008) ("*Verizon White Paper*").

[15] *See Minn. PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007).

[16] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., *reprinted at* 1996 U.S.C.C.A.N. 10, 126 (1996).

[17] *See Verizon White Paper* at 5-14.

virtual NXX offerings has obliterated the link between one's number and one's location, bedeviling efforts to distinguish among local, intrastate toll, and interstate calls. Moreover, use of these offerings is on the rise, promising to render such jurisdictional determinations even more difficult going forward. Even if there *were* a way to differentiate local, intrastate, and interstate traffic, there would be no reason to implement the necessary tools except to clear regulatory hurdles.[18]

Given the above, state access charges will necessarily be applied to a nontrivial quantity of interstate traffic. Assuming the Commission has determined that federal policies require a bill and keep approach for interstate traffic, this application of state charges to interstate access will interfere with federal policy goals. In these circumstances, "[agency] regulations are to be given pre-emptive effect over conflicting state laws."[19] The Commission is therefore entitled to preempt state authority over compensation for local and intrastate calls to the extent that

[18] Thus, recent trends have broadened the applicability of conclusions the Commission reached regarding Vonage's VoIP traffic in 2004: "Without a practical means to separate the service, the *Minnesota Vonage Order* unavoidably reaches the interstate components of the DigitalVoice service that are subject to exclusive federal jurisdiction. Vonage has no means of directly or indirectly identifying the geographic location of a DigitalVoice subscriber. Even, however, if this information were reliably obtainable, Vonage's service is far too multifaceted for simple identification of the user's location to indicate jurisdiction. Moreover, the significant costs and operational complexities associated with modifying or procuring systems to track, record and process geographic location information as a necessary aspect of the service would substantially reduce the benefits of using the Internet to provide the service, and potentially inhibit its deployment and continued availability to consumers." *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, 22418-19 ¶ 23 (2004) (footnote omitted) (subsequent case history omitted) ("*Vonage Order*").

[19] *United States v. Locke*, 529 U.S. 89, 109-10 (2000). *See also City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.").

authority is exercised in a manner conflicting with federal policy -- in other words, to the extent the state imposes a positive rate.[20]

Having preempted state authority over intercarrier compensation rates, the Commission would then be free to adopt a bill and keep regime for all traffic. As noted above, the current record includes ample evidence demonstrating that bill and keep for termination of telecommunications traffic involving a LEC is economically efficient, consistent with the public interest, just, and reasonable.

B. The Commission Has Legal Authority to Adopt a Unified $0.0007 Rate for Termination of All Calls.

Although Qwest would prefer a bill and keep solution (subject to the ARRM) over a unified $0.0007 per-minute terminating rate (again subject to the ARRM), the Commission also has authority to impose the latter solution.

1. The Commission Could Effectuate A Unified $0.0007 Rate Plan Under Sections 251(b)(5) And 252(d)(2) Of The Act.

The Commission could effectuate a unified $0.0007 rate plan under sections 251(b)(5) and 252(d)(2) by prescribing that plan, rather than bill and keep, as the methodology that will govern compensation for termination of all traffic.

For the reasons described above, the Commission could revisit its previous decision regarding the scope of section 251(b)(5), and find that this provision encompasses all

[20] As the Commission explained in the *Vonage Order*: "[T]o whatever extent, if any, DigitalVoice includes an intrastate component, because of the impossibility of separating out such a component, we must preempt the *Minnesota Vonage Order* because it outright conflicts with federal rules and policies governing interstate DigitalVoice communications." *Vonage Order*, 19 FCC Rcd at 22423-24 ¶ 31.

telecommunications traffic involving a LEC or CMRS provider and that it is entitled to prescribe a methodology for setting rates for section 251(b)(5) reciprocal compensation.[21]

The Commission can also find that section 252(d)(2) permits a unified \$0.0007 rate plan as a methodology. Again, as discussed above, the language of section 252(d)(2) suggests that Congress intended that state discretion would be more circumscribed in the 251(b)(5) context than in the sections 252(d)(1) and 252(d)(3) context that was directly at issue in the *Iowa Utilities Board* decision. Additionally, based on evidence in the record in this proceeding -- and in particular the negotiated and arbitrated interconnection agreements that formed the basis for its adoption of an interim \$0.0007 rate for ISP-bound traffic and the fact that a great deal of traffic is today exchanged at this rate subject to the so-called *ISP Remand Order*'s "mirroring rule"[22] -- the Commission could determine that \$0.0007 per minute represents "a reasonable approximation" of the relevant costs and apply that rate to all traffic. It is also noteworthy that section 252(d)(2)(B)(i) expressly permits "arrangement*s* that afford the mutual recovery of costs through the offsetting of reciprocal obligations, *including* arrangements that waive mutual recovery (such as bill-and-keep arrangements)[.]"[23] In other words, it is clear that bill and keep, where there is a complete waiver of mutual recovery through terminating rates, is just one conceivable "offsetting" methodology authorized by this section. Another such methodology is a unified \$0.0007 rate plan that still relies almost entirely upon mutual recovery of costs through the offsetting of reciprocal obligations while establishing a very low residual terminating rate.

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[21] *See* pages 2 to 4, *supra*.

[22] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9190-91 ¶ 85 (2001) ("*ISP Remand Order*"), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2001), *cert. denied*, 538 U.S. 1012 (2003); *id.* at 9193-94 ¶ 89.

[23] 47 U.S.C. § 252(d)(2)(B)(i) (emphasis added).

The Commission could also strengthen its legal authority to adopt a unified \$0.0007 rate plan by doing so only as a transition to bill and keep. The Commission's authority to establish transitional rates in such circumstances is well recognized.[24] For this reason, Qwest urges the Commission to, in the event it does establish a unified \$0.0007 terminating rate regime rather than bill and keep, do so only as a transition to bill and keep.

Another potential approach to strengthen the Commission's legal authority to adopt a unified \$0.0007 rate plan is to establish a \$0.0007 plan as a rate cap. Under this approach, the plan would cap per-minute recovery at \$0.0007 per minute, but then permit states to establish the specific rate applicable to a given agreement, so long as that rate does not exceed \$0.0007. This approach would even more clearly constitute a methodology and could also be supported by the record. But, this solution would surrender whatever benefits would arise from a unified overall rate. Because of this, Qwest prefers that the Commission, should it establish a unified \$0.0007 terminating rate regime rather than bill and keep, take the transitional approach described above rather than establishing \$0.0007 as a rate cap.

2. The Commission Could Effectuate A Unified \$0.0007 Rate Plan For Intrastate Access Under Section 201 of the Act.

In the alternative, again in the event the Commission were to conclude that intrastate access does not fall within the scope of section 251(b)(5), the Commission could implement a

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[24] *See, e.g., In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17139-40 ¶ 267 (2003) (subsequent history omitted); *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2613-14 ¶ 145 (2005), *aff'd sub nom. Covad Communs. Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783, 16792-99 ¶¶ 17-30 (2004).

$0.0007 rate for intrastate access under its section 201 authority, relying on preemption of inconsistent state action.[25] Such preemption would rely on the rationale discussed above and in Verizon's recent white paper.[26] However, rather than determining that all positive rates (*i.e.*, anything other than a bill and keep methodology) conflict with federal policy, the Commission would find that rates above $0.0007 violate this policy. As noted above, such a finding could be supported by information in the instant record.

3. If It Adopts A Unified $0.0007 Rate Plan, The Commission Also Has The Authority To Freeze Current Bill And Keep Arrangements.

If it adopts a unified $0.0007 terminating rate plan, the Commission also has the authority to freeze current bill and keep arrangements or other arrangements calling for rates lower than

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[25] *See supra* Section II.A.2. Under this rationale, the Commission would still rely on sections 251(b)(5) and 252(d)(2) to establish a $0.0007 terminating rate plan for local traffic, but would rely on section 201 and its preemption authority to establish a $0.0007 terminating rate plan for interstate traffic and to preclude rates above $0.0007 for termination of intrastate access traffic.

[26] *See Verizon White Paper* at 14-26. On September 30, 2008, the National Telecommunications Cooperative Association ("NTCA") filed an *ex parte* letter attempting to refute the contentions in the *Verizon White Paper*. *See* Letter from Daniel Mitchell, NTCA to Marlene H. Dortch, FCC, (filed Sept. 30, 2008). However, the arguments presented in the NTCA *ex parte* are not well founded. Indeed, NTCA's contentions regarding Verizon's preemption argument and, more generally, to the allocation of authority between the Commission and the states all appear to stem from a fundamental misreading of the law. Specifically, NTCA contends that Congress preserved and, in fact, enhanced state authority through the 1996 Act, as indicated by section 251(d)(3)(preserving certain state regulations to the extent "consistent with the requirements of this section"). *Id.* at 4. According to NTCA, state commissions have exclusive jurisdiction over both intrastate access rates and reciprocal compensation rates and therefore the Commission does not have authority to establish a "one-size fits all default $0.0007 terminating access rate[.]" *Id.* at 3. NTCA is wrong. As the Supreme Court makes clear in the *Iowa Utilities Board* decision, the 1996 Act gave the Commission authority to enact rules and policies in intrastate areas of local competition except where state jurisdiction is expressly recognized. *See* note 7, *supra*, 525 U.S. at 378 n.6 ("[t]he question ... is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionable has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations [emphasis in original]."). *See also id.*, 525 U.S. at 381 ("After the 1996 Act, § 152(b) may have less practical effect. But, that is because Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control.")

\$0.0007. As Qwest detailed in its recent *Comprehensive Reform Letter*, there are very good policy reasons to ensure that, in adopting a unified \$0.0007 terminating rate plan, the Commission does not cause rates to *rise*. There is also ample legal authority for this result. First, in the event, as Qwest suggests above, that the Commission establishes a unified \$0.0007 terminating rate regime as a transition to bill and keep, it could then also freeze either bill and keep or rate arrangements below \$0.0007 as part of that transition. Again, the Commission's authority to establish such transitional rates is well recognized.[27]

Even if the Commission were to adopt a permanent \$0.0007 terminating rate, it need not disturb existing arrangements adopting lower rates or bill and keep. There is no question that the Commission can rule that existing contractual arrangements calling for rates below \$0.0007 are not impacted by its decision.[28] Additionally, the Commission can make clear in its order that it does not preempt prior state decisions calling for either lower rates or bill and keep.[29] Indeed, the Commission can and should go even further, and order that those prior arrangements should at least presumptively remain in force after the implementation of a new, unified \$0.0007 rate regime. As suggested in Verizon's recent white paper, this conclusion would be justified by a finding that negotiated rates are presumptively reasonable, coupled with a finding that the public interest warrants retention of rates closer to bill and keep where such rates have proven feasible in a given context.[30] And, if the Commission has any doubts about its authority to do this, it can simply establish bill and keep/lower rates as the presumptive methodology in those limited

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[27] *See* note 24, *supra*.

[28] *ISP Remand Order*, 16 FCC Rcd at 9187-88 ¶ 79. *And see United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[29] *ISP Remand Order*, 16 FCC Rcd at 9189 ¶ 82.

[30] *See Verizon White Paper* at 31-32.

circumstances subject to the ability of a party to present adequate evidence supporting an increase to $0.0007 per minute to overcome that presumption.[31]

C. The Commission Has Legal Authority to Implement an Access Revenue Recovery Mechanism Pursuant to Section 254 of the Act.

Whether it adopts a bill and keep regime or a $0.0007 per-minute rate, the Commission has authority to implement Qwest's proposed ARRM. As described more fully in Qwest's *Comprehensive Reform Letter*, the ARRM would involve a combination of (1) subscriber line charge ("SLC") increases and (2) explicit support designed to ensure that any revised intercarrier compensation system does not deprive carriers facing particularly high costs from recovering those costs. The ARRM would *not* guarantee that a provider retain access to revenues equivalent to those it received prior to reform.[32] But, it would satisfy the legal requirement that, with the adoption of either a bill and keep regime or a $0.0007 per-minute rate plan, carriers have a reasonable opportunity to recover their costs.[33]

The Act provides the Commission with substantial authority to adopt the ARRM as proposed by Qwest. To the extent that the Commission relies on SLC increases, these increases are permitted by (*inter alia*) sections 4(i) and 201-205 of the Act, which together afford the Commission broad discretion in establishing carrier rates. To the extent the Commission implements a new explicit support mechanism to spread costs beyond a specific carrier's consumers, this action would be warranted by section 254 of the Act, which directs the

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[31] There is some precedent for this approach. *See Local Competition Order*, 11 FCC Rcd at 9187-88 ¶ 79.

[32] *See Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

[33] *Id.*

Commission to ensure that rates paid by customers in high-cost areas are "just, reasonable, … affordable," and "reasonably comparable to rates charged … in urban areas."[34]

Indeed, in 2000 and 2001, the Commission found that these provisions justified actions legally identical to adoption of the ARRM proposed by Qwest here.[35] In the 2000 *CALLS Order*, the Commission adopted a plan that removed implicit subsidies in price-cap carriers' access charges and "replaced" the relevant revenues by increasing SLCs and creating a new explicit support mechanism, the interstate access support fund.[36] The Commission found authority for raising the SLC in sections 4(i) and 201-205 of the Act,[37] and authority for creating the interstate access support mechanism in section 254.[38] Similarly, the *MAG Order* addressed access rates for rate-of-return carriers, raising SLCs and "creat[ing] a universal service support mechanism," the Interstate Common Line Support mechanism, "to replace implicit support in the interstate access charges with explicit support."[39]

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[34] 47 U.S.C. § 254(b)(1), (3).

[35] *See In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board On Universal Service,* Sixth Report and Order in CC Docket Nos. 96-262 and 91-4, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) ("*CALLS Order*"); *In the Matter of Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613 (2001) ("*MAG Order*").

[36] *See CALLS Order*, 15 FCC Rcd at 13046 ¶ 201.

[37] *See id.* at 12991 ¶ 76 n.120

[38] *See id.* at 13046 ¶ 201.

[39] *MAG Order*, 16 FCC Rcd at 19617 ¶ 3; *see also id.* at 19621 ¶ 15.

For these reasons, the Commission enjoys substantial discretion to adopt the ARRM as proposed by Qwest.[40]

III. CONCLUSION.

For the reasons stated above, the Commission has ample legal authority to undertake intercarrier compensation reform consistent with Qwest's *Comprehensive Reform Letter*.

[40] Nor is it a material distinction that, in this case, the Commission would be increasing rates for an interstate service to make up, in part, for a decrease in rates for intrastate services. It is enough that the SLC increases and new explicit support mechanism, standing alone, fall within the Commission's broad authority under sections 201 through 205 and they clearly do.